Supreme Court, U.S.
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No. 02-1779

IN THE
# Supreme Court of the United States

GREG SEINFELD,

*Petitioner,*

*v.*

CAROL A. BARTZ; JOHN T. CHAMBERS; MARY A. CIRILLO; JAMES F. GIBBONS; EDWARD R. KOZEL; JAMES C. MORGAN; JOHN P. MORGRIDGE; ARUN SARIN; DONALD T. VALENTINE; STEVEN M. WEST; and CISCO SYSTEMS, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## SUPPLEMENTAL BRIEF FOR PETITIONER

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## A RECENT DECISION ENHANCES THE IMPORTANCE OF THE QUESTION

In *Shaev v. Hampel*, 02-9453, September 17, 2003, the Second Circuit, by non-precedential summary order, affirmed dismissal of a complaint that alleged that a proxy statement made material misstatements and omissions as to the number of shares available under a stock incentive plan and also as to the cost of the plan. As the result of this decision, corporate boards need disclose neither the number of shares nor the cost of stock option plans when they solicit stockholder approval.

The Second Circuit order frustrates the expressed intention of Congress in enacting § 14(a) as found by this Court in *J.I. Case v. Borak*, 377 U.S. 426, 431-32 (1964):

> "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S.Rep.No. 792, 73d Cong., 2d Sess., 12; 377 U.S. at 431.

The Second Circuit's sole authority was *Resnik v. Swartz*, 303 F.3d 147 (2nd Cir. 2002), which does not address the number of shares issue, nor did the court cite 17 C.F.R. § 240.14a-101 (Item 10)(b)(2)(i)(A), which states:

> (2)(i) With respect to any specific grant of or any plan containing options, warrants or rights submitted for security holder action, state:
>
> (A) The title and amount of securities underlying such options, warrants or rights; . . .

The district court's opinion, *Shaev v. Hampel*, 2002 WL 31412805 (S.D.N.Y. 2002), was cited in the Petition and in the Opposition.

Even if the Second Circuit were correct, that the number of shares in a plan can be omitted from the proxy statement, it has enhanced the importance of the question. Its decision will promote a proliferation of plans of unknown size and with unknown cost. They will increase the harm to our capital markets which can expect increased uncertainty and volatility as even more information will be withheld.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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